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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1952.

No. 531.

S. BUCHSBAUM & CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF.

The arguments in the brief in opposition are not correct.

Respondent's arguments in defense of the decision below do not withstand analysis.

Respondent contends that the letter of April 10, 1946, spoke for itself and clearly indicated that statutory relief under Section 17(a) was sought. But this is not correct. Examination of the letter shows that it made no reference to Section 17(a) but was a "Request for Price Increase" (R. 60); that with it were furnished "Change Order Cost Estimate Sheets" and cost schedules, (R. 61) all of which 46 pages of attachments were identical to the attachments

to petitioner's letter of September 7, 1945 (R. 63). Examination of petitioner's letter of September 7, 1945 shows that therein petitioner asked respondent to "issue a change order" (R. 12). Under the "Changes" article of the contract a price increase was obtainable by change order (R. 8) and consequently the letter of April 10, 1946 revised the change order request of September 7, 1945 by requesting a price increase. In the affidavit of September 7, 1946 petitioner's assistant treasurer stated that after the letter of September 7, 1945 requesting the issuance of a Change Order, an audit was attempted by respondent's auditor and revision was suggested but due to the pressure to complete termination settlements, the revised request for price increase was not presented until April 10, 1946 (R. 75), and that the first claim under Section 17(a) was that made in the letter of August 5, 1946 (R. 75, 76).

Respondent lays stress upon the words "never formalized" (R. 60) and contends that the claim of January 30, 1940 was almost identical to the claim of April 10, 1946. But two words thus selected from context cannot change the fact that petitioner used them in asking for a change order, in requesting a price increase under the "Changes" article of the contract (R. 60 to 62). A comparison of the letter of April 10, 1946 (R. 60 to 62) and the claim of January 30, 1948 (R. 79 to 89) discloses, contrary to respondent's contention, that they are not almost identical but on the contrary almost entirely different. On the other hand a comparison of the letter of April 10, 1946 and the letter of September 7, 1945 (R. 11 to 57) discloses that they are in fact identical. Accordingly, respondent's contention is not correct.

Respondent apparently contends that because the Court of Claims has in other cases awarded summary judgment sparingly, it does not matter what it did in this case. But certainly the exercise of summary judgment procedure is not a matter of whim and caprice and the proper administra-

tion of justice requires that all litigants received equal justice. Hence, respondent's argument is not correct.

Respondent contends that the credibility of witnesses is not involved and that evidence would not affect the outcome of the proceedings. Yet a reading of the opinion of the Appeal Board of The Office of Contract Settlement discloses that only its rule as to burden of proof on appeal, operating to petitioner's disfavor, caused it to decide against petitioner (R. 96) and the rule adopted by the Board is the exact opposite of the rule as to burden of proof in summary judgment procedure. Thereunder, the burden of proof is upon respondent. *Sarnoff v. Ciaglia*, 3d Cir., 1947, 115 F. 2d, 167, 168.

Petitioner asks the right to cross-examine Leonard A. Wells, respondent's contracting officer, to establish thereby, as indicated by the Office of Contract Settlement Appeal Board (R. 96), that he did not consider petitioner's letter of April 10, 1946 to be a Section 17(a) claim. To deny petitioner that right, is to deny petitioner the right to offer evidence which would establish petitioner's case and this was error. *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 628. Hence respondent's argument is not correct.

Contrary to respondent's contention that petitioner cannot demonstrate any oral testimony which would alter the conclusion reached by the Court of Claims, petitioner proposes to demonstrate by oral testimony that by its letter of April 10, 1946 it sought only the same relief asked in its letter of September 7, 1945, viz. a price increase by change order, and that respondent's contracting officer did not deny petitioner's request for price increase of April 10, 1946 under Section 17(a) of the Contract Settlement Act. Petitioner has demonstrated that evidence exists whereby these points can be proved and respondent's arguments that such evidence does not exist are incorrect. Hence, there does exist a dispute over material facts.

CONCLUSION.

Certiorari should be granted and the Court of Claims ordered to remand the case for further proceedings.

Respectfully submitted,

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